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JIMMY L. MURPHY,)
)
Appellant-Defendant,)
)
vs.) No. 89A01-0708-CR-361
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

May 7, 2008

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jimmy L. Murphy (Murphy), appeals his sentence following his conviction for Counts I-VI, child molesting, Class A felonies, Ind. Code § 35-42-4-3(a)(1), and Counts VII-VIII, sexual misconduct with a minor, Class B felonies, I.C. § 35-42-4-9(a)(1).

We reverse and remand with instructions.

ISSUE

Murphy raises one issue on appeal which we restate as follows: Whether the trial court abused its discretion by sentencing him to an aggregate sentence of eighty-two years.

FACTS AND PROCEDURAL HISTORY

K.S. was born on December 21, 1990. Her parents divorced when she was one year old and she spent most of her younger years with her mother. They moved frequently. Over the years, K.S. and her mother lived with a number of her mother's boyfriends, including Murphy. Although K.S. resided with her mother and her mother's then current boyfriend from early summer of 2004 to November 2004, she also spent a considerable amount of time with Murphy and his family from the beginning of March 2004 until January of 2005. K.S. was thirteen years old at that time.

Murphy, his wife, and their two children resided at a trailer park on National Road in Richmond, Indiana. On May 24, 2004, after Murphy's wife had left the trailer, Murphy called K.S. into his bedroom and proceeded to have sexual intercourse with her. Over the course of the following months, he had intercourse with K.S. twice in June of 2004, once in

October of 2004, once in November of 2004, once in December of 2004, and twice in January of 2005.

On February 22, 2005, the State filed an Information charging Murphy with six Counts of child molesting, Class A felonies and two Counts of sexual misconduct with a minor, Class B felonies. On February 27, 2007 through March 2, 2007, a jury trial was held. At the close of the evidence, the jury found Murphy guilty as charged. On June 1, 2007, the trial court conducted a sentencing hearing. The trial court found two aggravators—Murphy’s criminal history and his violation of probation—and one mitigator—hardship on Murphy’s dependents. Finding that the aggravators outweighed the single mitigator, the trial court imposed an enhanced sentence of thirty-five years each on Counts I, II, III, with sentences to run concurrently. On Counts IV, V, and VI, the trial court imposed thirty-five years each, to run concurrent to each other and consecutive to Counts I-III. With regard to Counts VII and VIII, the trial court ordered twelve years each, to run concurrent to each other, but consecutive to Counts I-VI. In sum, Murphy was sentenced to an aggregate sentence of eighty-two years.

Murphy now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Murphy contends that an enhanced, consecutive sentence of an aggregate eighty-two years is not appropriate.¹ Specifically, Murphy makes a two-fold argument: (1) he was

¹ As the offenses to which Murphy was convicted occurred before the new Indiana sentencing statutes became effective in April 2005, we will apply the presumptive sentencing scheme.

sentenced in violation of his *Blakely* rights and (2) his enhanced, consecutive sentence is based on improper aggravators.

I. *Standard of Review*

At the outset, we note that sentencing decisions are within the trial court's discretion, and will be reversed only upon a showing of abuse of discretion. *Powell v. State*, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). The trial court's sentencing discretion includes the determination of whether to increase presumptive penalties. *Madden v. State*, 697 N.E.2d 964, 967 (Ind. Ct. App. 1998), *trans. denied*. In doing so, the trial court determines which aggravating and mitigating circumstances to consider, and is solely responsible for determining the weight to accord to each of these factors. *Perry v. State*, 751 N.E.2d 306, 309 (Ind. Ct. App. 2001). The sentencing statement must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reason why each circumstance is aggravating and mitigating; and (3) demonstrate that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. *Powell*, 751 N.E.2d at 315. We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. *Id.*

II. *Murphy's Blakely Rights*

As an initial matter, we note that Murphy argues that the trial court's finding of aggravating circumstances violated his rights under *Blakely v. Washington*, 542 U.S. 296,

124 C. St. 2531 (2004). Regardless whether *Blakely* applies to the instant case for sentencing purposes, the trial court did not violate the rule proponent in *Blakely*.

In *Blakely*, the United States Supreme Court stated, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). “Under *Blakely*, a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Apprendi* rights and consented to judicial factfinding.” *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007). Here, the trial court found two aggravators: Murphy’s criminal history and his violation of probation. Not only did the trial court receive a hardcopy of Murphy’s criminal history, Murphy also admitted to his previous criminal true findings, convictions, and probation violation during the sentencing hearing. Therefore, these are valid aggravators in light of *Blakely*.

III. *Imposition of an Enhanced, Consecutive Sentence*

Finding that the aggravators outweighed the mitigator, the trial court imposed an enhanced sentence of thirty-five years each on Counts I, II, III, with sentences to run concurrently. On Counts IV, V, and VI, the trial court imposed thirty-five years each, to run concurrent to each other and consecutive to Counts I-III. With regard to Counts VII and VIII, the trial court ordered twelve years each, to run concurrent to each other, but

consecutive to Counts I-VI. In sum, Murphy was sentenced to an aggregate sentence of eighty-two years. We note that the presumptive sentence for a Class A felony is thirty years, with not more than twenty years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances. I.C. § 35-50-2-4 (2004). The presumptive sentence for a Class B felony is ten years, with not more than ten years added for aggravating circumstances or not more than four years subtracted for mitigating circumstances. I.C. § 35-50-2-5 (2004).

The trial court enhanced Murphy's sentences five years above the presumptive for the Class A felonies and two years above the presumptive for the Class B felonies based upon two aggravators: his criminal history and his violation of probation. The record establishes that Murphy's criminal history consists of juvenile dispositions and adult convictions. Specifically, his juvenile record reflects a 1992 true finding for criminal mischief, which would have been a Class A misdemeanor if committed by an adult, and a 1992 true finding for residential entry, which would have been a Class D felony if committed by an adult. His record further shows several arrests. Even though the trial court in its enumeration of true juvenile findings listed a 1996 burglary, the record reflects that this disposition was "deferred." (Appellant's App. p. 215).

Murphy's adult criminal history is somewhat lengthier, consisting of three misdemeanor counts of operating without a license in 1996, 1997, and 2000 respectively, a misdemeanor operating without proof of financial responsibility in 1997, a misdemeanor

false informing in 1999, a misdemeanor contempt of court in 2000, and a Class D felony theft in 2004, which was entered as an A misdemeanor.

The significance of a defendant's prior criminal history in determining whether to impose a sentence enhancement will vary "based on the gravity, nature and number of prior offenses as they relate to the current offense." *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004). While we recognize that Murphy's criminal history is a valid aggravating circumstance, we find it is of little weight in the instant offense. None of Murphy's prior offenses bears any relation to the crime for which the sentence enhancement was applied. They are neither similar in gravity nor nature to the current offenses. *Id.*

As a second aggravator, Murphy admitted to and the trial court used as an aggravator his probationary status at the time he committed five of the Class A felonies child molesting. In particular, at the time he committed the first five child molesting charges, Murphy was on probation for theft. Probationary status is a valid aggravating factor, and sufficient to support a sentence enhancement. *Prickett v. State*, 856 N.E.2d 1203, 1209 (Ind. 2006). As we stated before, one valid aggravating factor can, depending on the circumstances, be sufficient to enhance a presumptive sentence. *Sherwood v. State*, 702 N.E.2d 694, 699 (Ind. 1998), *reh'g denied*. Here, we find that the trial court properly enhanced his sentence based on the finding of these aggravators.

Nevertheless, although the same aggravating circumstance may be used to both enhance a sentence and justify consecutive terms, we do not find that the combined weight of the aggravators, besides the sentence enhancement, also warrants the imposition of

consecutive sentences. *See, e.g., Taylor v. State*, 710 N.E.2d 921, 925 (Ind. 1999). As we noted above, the criminal history aggravator can only be given little weight, whereas, the second aggravator is somewhat limited as the underlying charge of Murphy's probation violation is not related to his current charges of child molesting. Thus, we find that the trial court abused its discretion in imposing consecutive sentences between Counts I-III and Counts IV-VI and between Counts I-VI and Counts VII-VIII.

CONCLUSION

Based on the foregoing, we conclude that the trial court abused its discretion in sentencing Murphy. We reverse and remand with instruction to impose a concurring sentence between Counts I-III and Counts IV-VI and between Counts I-VI and Counts VII-VIII, for a total aggregate sentence of thirty-five years.

Reversed and remanded.

BAKER, C.J., and ROBB, J., concur.